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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 569

HOWARD CURRY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

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Petitioner Howard Curry prays for a Writ of Certiorari to review the judgment of the Supreme Court of Florida entered in the above case on 28 June 1968.

Opinions Below

The opinion of the Supreme Court of Florida is reported at 211 So.2d 169, (A).

Jurisdiction

The judgment of suspension of the Supreme Court of Florida was filed 15 May 1968. (A. 1). Petition for

Rehearing was denied on 28 June 1968. On 31 July 1968 the Honorable Hugo Black, Justice of the Supreme Court of the United States granted Petitioner's "Application for Stay of Judgment of Suspension of the Supreme Court of Florida."

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Whether a state in a disciplinary procedure—disbarment or suspension—can use the threat of contempt of Court to secure incriminatory evidence against an accused lawyer contrary to Constitutional guarantees against self-incrimination as contained in the Fifth and Fourteenth Amendments to the United States Constitution?

2. Has a lawyer been denied equal protection of law where he is suspended from practice upon the recommendation of the Board of Governors of the Integrated Florida Bar where the membership of said Board is geographically determined, but grossly violates the "one man-one vote" rule?

3. Has a lawyer been denied due process of law where the record fails to reveal whether the governing body of the Florida Bar complied with the procedure required by the Integration Rule concerning disciplinary procedures, and the suspended lawyer was denied the right to have the question of his suspension orally argued by the counsel of his choice before the Supreme Court of Florida by virtue of an Act of God?

Integration Rule of The Florida Bar, Statutes and Constitutional Provisions Involved:

INTEGRATION RULE OF THE FLORIDA BAR

Article III

BOARD OF GOVERNORS

"1. The Board of Governors shall be the governing body of The Florida Bar. The Board shall consist of the President of The Florida Bar, the President-elect, the President of the Young Lawyers Section, the President-elect of the Young Lawyers Section who shall not be entitled to vote except in the absence of the President of the Young Lawyers Section, and representatives elected from the active members of The Florida Bar in each judicial circuit. The total number of representatives elected from judicial circuits shall be twice the number of the total of all the judicial circuits as constituted at the time of the election. The circuit representatives shall be apportioned among, elected from and hold office for the terms as in this Article provided.

(a) One-half of the circuit representatives shall be apportioned among and elected from the judicial circuits on the basis of one representative from each circuit.

(b) One-half of the circuit representatives shall be apportioned among and elected from the judicial circuits on the basis of the number of active members of The Florida Bar residing in each circuit. The formula and mechanics of this and for determining the number of representatives in this manner apportioned to and elected

from each judicial circuit shall be: first, determine the average number of active members of The Florida Bar residing in each judicial circuit by dividing the total of the number of judicial circuits into the number of active members of The Florida Bar residing in Florida, and then divide the resulting average into the number of active members of The Florida Bar residing in each judicial circuit. Apportionment among and election of representatives shall be in accordance with the results thus obtained and by apportioning to each judicial circuit of one representative for each multiple of one of the results obtained and one for each fraction thereof in accordance to size in descending order from the largest fraction to the next largest fraction and so on until all representatives are apportioned to judicial circuits.

(c) * * *

(d) * * *

(e) * * *

2. The members of the Board of Governors from each judicial circuit shall be nominated and elected by the active members of The Florida Bar residing in such judicial circuit. Each elected member shall hold office for two years and until his successor is elected and qualified. Elections in odd numbered circuits shall be held in odd numbered years, and elections in even numbered circuits shall be held in even numbered years. The By-Laws shall provide for all nominations and elections of members of the Board of Governors. Newly elected members shall take office at the conclusion of the annual meeting of The Florida Bar following election to office. Any

vacancy on the Board of Governors arising in the office of representative from a judicial circuit shall be filled by vote of the remaining members of the Board for the unexpired term, from the active membership of such circuit."

Article XI

RULES OF DISCIPLINE

Rule 11.04: Investigation By Grievance Committee

(1) * * *

(2) *The accused.* The accused may be required to testify and to produce evidence as any other witness, and when so required he may be accompanied by counsel. The accused has no right to be present or to be heard during an investigation, but before any finding of probable cause is recommended the accused shall be advised in general terms the nature of the conduct which is being investigated, and he shall be given an opportunity to make a statement, personally or by counsel, verbally or in writing, sworn or unsworn, explaining, refuting or admitting the alleged misconduct. The accused shall have no right to present other testimony or evidence, and he shall have no right of confrontation or cross-examination.

(3) *Testimony of witnesses; contempt.* The accused attorney or any other person who is subpoenaed to appear and give testimony or to produce books, papers or documents, and who refuses to appear or produce such books, papers or documents before the grievance committee or who, having been duly sworn to testify, refuses to answer any proper question, may be cited for contempt of this

Court. Any contempt proceedings instituted or prosecuted during the progress of an investigation or trial covered by the confidential rule shall be conducted in a manner consistent with such rule and shall not be made public except under conditions prescribed in such rule.

(4) * * *

(5) * * *

(6) * * *

Rule 11.06: Trial by Referee and Entry of Judgment

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(6) * * *

(7) *The respondent.* The respondent may be called as a witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues. When the respondent attorney is subpoenaed to appear and give testimony or to produce books, papers or documents, and he refuses to appear or to produce such books, papers or documents, or, having been duly sworn to testify, he refuses to answer any proper question, he may be cited for contempt of this Court.

(8) *Complaining witness.* The complaining witness shall have no rights other than those of any other witness; he has no right to be present during a hearing or trial but he may be called upon to testify and produce evidence as any other witness. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise or restitution will excuse failure to complete any trial.

(9) *Findings and judgment.*

(a) *Record and report of referee.* Within thirty (30) days after the conclusion of a trial before a referee, or as soon thereafter as practical, he shall make a report and enter it as part of the record. The referee's report shall include (1) a finding of fact as to each item of misconduct of which the respondent is charged, (2) recommendations as to whether or not the respondent should be found guilty of misconduct justifying disciplinary measures, (3) recommendations as to the disciplinary measures to be applied, (4) a statement of the costs of the proceedings and recommendations as to the manner in which costs should be taxed. The costs shall include court reporters' fees, witness fees and traveling expenses, and reasonable traveling and out of pocket expenses of the referee and bar counsel, if any. Within five (5) days after the entry of findings of the referee, the record of the proceeding shall be filed with the Executive Director. Within five (5) days after such filing, a notice thereof together with a copy of the report of the referee shall be served upon bar counsel and upon the respondent by the Executive Director.

(b) *Statement of parties.* Bar counsel and respondent may each file a statement in support of or in opposition to the findings and recommendations of the referee. Such statement, if filed, shall be filed with the Executive Director within ten (10) days after service of a copy of the report of the referee or within five (5) days after receipt of such statement from an opposing party, and shall become a part of the record.

(c) *Review and entry of judgment.*

(i) *Review.* The entire record, which shall consist of the complaint and all other pleadings, transcript of testimony, exhibits, report of the referee and statement of the respondent in opposition thereto, if any, shall be referred to and read by a reviewing committee consisting of five members of the Board of Governors designated by the President. Such committee shall prepare a written report indicating the concurring and dissenting members of the committee as to the guilt of the respondent and as to its recommendations for disciplinary measures, if any. The report of the reviewing committee shall be considered by the Board; provided, however, that in the event less than four members of the committee concur as to the guilt of the respondent, or in the event the Board shall fail to approve the report of the committee as to the guilt of the respondent, then a quorum of the Board shall review the entire record in such manner as to insure protection of the rights of the accused.

(ii) *Judgment.* The Board of Governors shall enter an appropriate judgment in accordance with its findings which shall be signed by the President and a

copy of which shall be furnished to the respondent. If the respondent is found not guilty, the judgment shall dismiss the complaint. If the respondent is found guilty, the judgment shall set forth the disciplinary measures to be enforced. The costs shall be taxed in the discretion of the Board of Governors.

(iii) *Filing.* If the respondent is found guilty and the judgment includes public reprimand, suspension from practice or disbarment, the Executive Director shall file the entire record with the Clerk of the Supreme Court.

Florida Statute

877.02 Solicitation of legal services or retainers therefor; penalty.—

(1) It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said business and is done

pursuant to the canons of legal ethics as pronounced by the supreme court of Florida.

(3) Any person violating any provision of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than $500 or by imprisonment in the county jail not to exceed 6 months, or by both such fine and imprisonment.

(4) This section shall be taken to be cumulative and shall not be construed to amend or repeal any other valid law, code, ordinance, rule, or penalty now in effect.

Amendments V and XIV to the Constitution of the United States.

STATEMENT

This case involves disbarment proceedings brought against petitioner by the Florida Bar. On 7 February 1966, a preliminary hearing was held before the Florida Bar Grievance Committee "B" for the Eleventh Judicial Circuit, Dade County, Florida, a transcript of which was introduced into evidence at the subsequent trial before the Referee (R. 41-42).

Pursuant to Integration Rule 11.04 (2) petitioner was required to testify before the Grievance Committee and give evidence against himself although he was not represented by counsel nor was he faced with an accuser.

The Grievance Committee found probable cause to believe that petitioner had violated Canon 27 of the Professional Ethics by solicitation of professional employ-

ment, and on 14 March 1966 the Florida Bar filed a complaint against petitioner (R. 90-93). Florida Statute 877.02 makes solicitation of professional employment a crime, *supra* p. 9.

On 24 March 1966, petitioner, through his attorney, filed a Motion to Dismiss, alleging (R. 96-97):

> 1) That the Board of Governors is illegally and unlawfully constituted in that it is not constituted in accordance with Article III Board of Governors, Integration Rule of the Florida Bar, and that therefore, an action commenced in its behalf by the present Board of Governors is void for lack of jurisdiction over the persons or the subject matter.
>
> 2) That assuming arguendo that (i) The Florida Bar had jurisdiction over the respondent and (ii) that the respondent was guilty of some professional impropriety, a fact which is vehemently denied, by requiring the respondent to testify before the Grievance Committee of the Eleventh Judicial Circuit, the respondent has obtained immunity from any type of penalty of forfeiture, including the revocation of his license to practice law. See Sec. 932.29, F.S.A. *and State Beverage Department of Florida v. State of Florida, ex rel. Zucker* (Fla.App. 3rd 1960) 116 So.2d 640.
>
> 3) That the persons who presided over the preliminary hearing herein lack jurisdiction over the persons and the subject matter in that said

persons who presided over said preliminary hearing were not selected in accordance with the provisions of the Integration Rule of the Florida Bar.

4) That the canons and rules which respondent has allegedly violated under Count I are so vague, uncertain and indefinite that they furnish no guide to a practicing attorney upon which he can predicate his professional conduct, and said canons and rules are therefore unconstitutional under the due process clauses of the United States and Florida Constitutions.

On said Motion before the Referee on 14 September 1966 (R. 7,37) petitioner's counsel argued that because petitioner was required to testify against himself or subject himself to contempt of Court by virtue of Integration Rule 11.04(3) that he was immunized from further prosecution as to those matters about which he had been compelled to testify at the preliminary hearing. (R. 35)

" * * * I take the position that when you call him down there and the law requires him to testify just for example if you call a man before the Sheriff's Department right now, you don't testify you lose your job. In other words, you can't be employed by Dade County and invoke the Fifth Amendment. I say when you make him do that, that guy has gained immunity in different ways, that is by statute. There is no other way of getting immunity.

Petitioner repeatedly argued that all matters set forth in his Motion to Dismiss were not waived, thereby preserving the Constitutional rights raised in his Motion to Dismiss (R. 8, 10, 11, 12, 13, 14, 17, 18, 24, 25, 32, 34 and 35). The referee reserved ruling thereon (R. 36).

Thereafter petitioner and the Florida Bar entered into a stipulation (R. 101-103) agreeing, *inter alia*:

> 8. That Respondent's Motion to Dismiss, dated August 24, 1966, filed herein, raises certain issues going to the matter of jurisdiction over the Respondent and to the authority of the Board of Governors, the Referee and the Counsel for The Florida Bar to bring the present action against the Respondent. If these issues are, indeed, jurisdictional matters, or if there are constitutional issues relating to the Canons of Professional Ethics, as raised by Respondent's Motion to Dismiss, this Stipulation is not to be considered as speaking to such jurisdictional issues and constitutional issues, *and the Respondent is understood to have preserved such issues and matters for such further or other actions or proceedings as he may be advised.*

On 7 December 1966 the cause came on for hearing before the Referee (R. 38-39). Pursuant to Integration Rule 11.06 (7), *supra, page* 6, petitioner Curry was called, over his vehement protests, as a witness against himself for the Florida Bar (R. 42):

> MR. HOLCOMB: I call Mr. Howard Curry, the Respondent as a witness for the Florida Bar.

MR. LOUIS: Just for the Record I want to object because I don't believe—we have got a stipulation here and I think the Rules provide without any question of a right that the Florida Bar has a right to call Mr. Curry before it but I still object because I don't think the Rule is constitutional, but I have received nothing but the utmost co-operation from the attorney from the Florida Bar and the Referee but I still want the record to show that I distinctly object to any method, whether approved by the Florida Bar, any Board of Governors or the Supreme Court of Florida which permits and encourages anybody, whether it is any b-o-d-y, whether it be a judicial, semi-judicial or administrative, to prove up a case where a man can suffer a penalty, in this case the loss of his license to practice law, and where they call him and force him to testify.

MR. HOLCOMB: Your Honor, in support of my calling him as a witness, I would only emphasize that the Integration Rule permitting this was adopted by the Supreme Court and not by the Florida Bar. May we have a ruling on calling him as a witness?

THE REFEREE: Proceed.

THEREUPON, HOWARD CURRY, called as a witness by the Complainant, having been previously duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HOLCOMB:

Q. Mr. Curry, would you state your name and your address?

A. Howard Curry, 220 Miracle Mile, Coral Gables, Florida.****

Pursuant to Integration Rule 11.06(9)(b) Bar counsel, an attorney from petitioner's same judicial circuit recommended that petitioner Curry be found guilty as charged and be given a private reprimand (R.131).

On 30 January 1967, the Referee, also an attorney from petitioner's same judicial circuit, found attorney Curry guilty as charged and likewise recommended a private reprimand (R. 139-145), Paragraphs 3, 4, 5, 6 of the Findings of Fact within the report of the Referee, *inter alia*, stating:

3. That the aforesaid letter did not go to any persons other than to those whom he had previously come into contact with through his practice as a lawyer.

4. The Stipulation entered into between counsel for The Florida Bar and for the respondent recites that the addressees had a lawyer-client relationship with the respondent. Then it recites 'although the Respondent was not necessarily representing such persons as their lawyer at the time said letter was mailed.'

5. There is no evidence that the respondent had reason to believe that he had been supplanted by another lawyer.

6. The testimony emphasizes respondent's lack of intention to actually take legal business away from other lawyers or to profit by the consultations which the letter solicited.

On 1 April 1967 the Board of Governors of the Florida Bar, pursuant to Integration Rule 11.06(9)(c)(ii) entered its judgment adopting the findings of the Referee, but instead of a private reprimand, recommended that petitioner Curry be suspended from the practice of law for 6 months. (R. 147-8).

As the basis for his contention that he has been deprived of equal protection of the law because of the malapportionment of the governing body of the Florida Bar, petitioner relies on the following facts: On 7 June 1949 the Florida Supreme Court integrated the Florida Bar, requiring every lawyer practicing in Florida to belong thereto. *Petition of Fla. State Bar Ass'n.* (Fla. 1949) 40 *So.*2d 902. Thereafter, it also became mandatory that the affairs of the Florida Bar be conducted in accordance with the provisions of the Integration Rule.

Florida is divided into 17 judicial circuits. The governing body of the Florida Bar is its Board of Governors (Article III (1) of the Integration Rule). In 1966[1] of the the Rule provided that said Board shall be composed of three officers and representatives "elected from the active

[1]As amended by the Florida Supreme Court in *In the Matter of the Florida Bar,* (May 1965) 175 So. 2d 530.

members of the Florida Bar in each judicial circuit. The total number shall be twice the number of the total of all the judicial circuits"; to-wit: 2 x 17 = 34. One half of the Circuit representatives were elected from the 17 judicial Circuits on the basis of one representative from each Circuit. The other half of the Board was apportioned in accordance with a complicated mathematical formula (Article III, Section 1 (b), supra, p. 3-4).

The "Certification of Board Positions" published in the Florida Bar Journal, the official publication of the Integrated Florida Bar in January of 1966 (Vol. 40, No. 1, p. 8; A 12) announced that the number of practicing attorneys in Florida as of 15 December 1965 totalled 8,075, with 2,828 of said attorneys practicing in the Eleventh Judicial Circuit (Dade County), the circuit in which petitioner Curry practices and resides. Using the apportionment rule set forth in Section 1 (b) of Article III of the Integration Rule, supra, p. ____, the Eleventh Circuit (Dade County) was entitled to 7 representatives elected by those 2,828 members practicing in said Eleventh Circuit (Article III, Section 2, supra, p. 4).

Prior to May, 1965, the Eleventh Circuit (Dade County) was represented by only three lawyers. In May of 1965 the Supreme Court of Florida *In the Matter of The Florida Bar*, 175 So.2d 530 amended the Integration Rule by reapportioning the Board of Governors and *inter alia* created 4 additional representatives on the Board from the Eleventh Circuit (R. 99, 105). Instead of electing the four new Governors by vote of the active members of the Florida Bar of the Eleventh Circuit, the Board of Governors themselves admitted electing the four additional representatives from the Eleventh Circuit to full

two-year terms (R. 99, 100) (R. 105, 106). Moreover, two of the three members of the Board of Governors previously elected for two-year terms by popular election of the active members of the Eleventh Circuit, resigned and their two vacancies were legitimately filled by electing successors from the Eleventh Circuit to fill the unexpired terms of the Board of Governors in accordance with the Integration Rule (R. 99, 100; R. 105, 106). Therefore, at all times pertinent, the petitioner was not only disciplined by a geographically disproportioned Board of Governors, but of the seven governors from his own Eleventh Circuit, only one representative had been elected by the active members of the Florida Bar practicing in petitioner's same Eleventh Judicial Circuit.

Thus, Eleventh Circuit representatives comprised but 20% of the Board of Governors (as 7 is to 34) although approximately 35% of the active members of the Florida Bar reside and practice in said Eleventh Circuit (as 2,828 is to 8,075).

On 28 April 1967 attorney Curry appealed to the Supreme Court of Florida, raising the Constitutional issues here urged. In the opinion *sub judice*, the Florida Supreme Court affirmed the judgment of the Board of Governors and squarely denied to petitioner any protection by virtue of the United States Constitution (A. 9):

> [2] The third point is: "Where pursuant to reapportionment of Board of Governors of Florida Bar (in the matter of The Florida Bar, Fla., 175 So.2d 530) the Board of Governors appointed additional members to fill said newly created offices, instead of election by the active members

of The Florida Bar, was the enlarged Board of Governors unconstitutional and unlawfully constituted and any action taken thereby void?" We have considered this matter and conclude that the Board was duly and legally constituted and Mr. Curry's contention is without merit on that phase.

[3] The fourth point is: "Is the judgment of suspension entered in this action invalid where said judgment does not reflect whether the procedural steps for review set forth in Rule 11.06 (9) (c) (1) of the Integration Rule of The Florida Bar had been followed?" The record reveals that all steps were taken in this matter. In no way has Mr. Curry been deprived of notice and a hearing, hence this point has no merit.

[4] The fifth point is: "Where pursuant to Rule 11.04 (2) (3) of the Integration Rules, respondent was required to produce records and testify against himself before the Grievance Committee and before the Referee (over his objection) respondent was granted immunity under the Fifth and Fourteenth Amendments to the United States Constitution and Section 12, Declaration of Rights, Florida Constitution against any further disciplinary procedures." In this proceeding we have no statutory immunity where he is called to testify. Mr. Curry relies upon immunity under the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 12 of the Declaration of Rights of the Florida Constitution. At no time during

this proceeding did Mr. Curry refuse to testify or otherwise claim his constitutional rights against self-incrimination.

In addition thereto, in his Petition for Rehearing filed before the Court on or about 4 June 1968, under paragraph 5, the petitioner raised an additional ground now asserted before this Court:

5. The Court overlooked and failed to consider that in insisting that the hearing before this Court proceed without respondent being represented by counsel at the oral argument, even though respondent's counsel and counsel for The Florida Bar, Lyle Holcomb, were not present at said hearing due to circumstances beyond their control and due to an Act of God, respondent was denied due process in violation of Amendments V and XIV to the Constitution of the United States.

Prior to the oral argument, respondent agreed to a continuance of said oral argument in order to accommodate attorney Earl Waldin in his capacity as attorney for the Bar. At the oral argument before this Court attorney Waldin expressly indicated to this Court that the Florida Bar had no objection to continuing said oral argument until the undersigned counsel for respondent had an opportunity to appear and argue on behalf of respondent.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is in direct conflict with the decisions of this Court in *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed. 2d 574, 87 S. Ct. 625 and *Garrity v. State of New Jersey*, 385 U.S. 493, 17 L. Ed. 2d 562, 87 So. Ct. 625, or if it is not so in conflict, the issues of far-reaching importance left undecided in those cases must be faced. In either event, this Court should grant review because important and unsettled questions concerning disciplinary procedures and enforcement promulgated by State Courts in disciplining or disbarring lawyers are presently the subject of great public concern.

1. In the summer of 1967, the President of the American Bar appointed Mr. Justice Tom C. Clark, Chairman of a special committee on evaluation of disciplinary enforcement. Along with Justice Clark, the members of the committee were John G. Bonomi, New York, New York; Fred B. Hulse, Sedalia, Missouri; Robert W. Meserve, Boston, Massachusetts, David W. Richmond, Washington, D.C., Edward B. Rood, Tampa, Florida, John A. Sutro, San Francisco, California and David J. A. Hayes, Jr., Chicago, Illinois.

On 25 and 26 May 1968 this committee held its third regional meeting on disciplinary enforcement at the Americana Hotel on Miami Beach. The transcript of said meeting will reflect that the Florida Bar was recognized by the Chairman as having one of the most active disciplinary programs in the United States of America. Undoubtedly, with such a record and with the Honorable Edward B. Rood of Tampa, Florida, as a member of said committee,

the committee will undoubtedly rely heavily on the procedures and experience of the Florida Bar. It is, therefore, of great public interest for this Court to determine whether or not the disciplinary rules of the Florida Bar afford the Constitutional guarantees to members of the Florida Bar who practice both before Florida and Federal tribunals.

2. Both *Spevack v. Klein, supra, p.*— and *Garrity v. State of New Jersey supra p.* __, were cited to the Court below as authority that the Constitution proscribed any rule requiring a lawyer in a disciplinary proceeding to produce records or testify against himself. The Florida Supreme Court avoided passing on the constitutionality of its own Integration Rules* by adjudicating that "at no time during this proceeding did Mr. Curry refuse to testify or otherwise claim his constitutional rights against self-incrimination." (A- __)

With due diffidence, petitioner respectfully submits that he repeatedly preserved his constitutional rights— not only in his Motion to Dismiss (R. 96-97 *supra*, p. 11), but also in the stipulation between the parties (R. 101-103), *supra*, p. 13. Further, at the hearing before the Referee on 7 July 1966, petitioner vociferously objected to being required to testify against himself. (R. 42).

By virtue of the Integration Rule, prior to the publication of the opinion sought to be reviewed, all proceedings were secret. This Court has recognized that the procedures utilized by the petitioner to challenge the validity and the constitutionality of the Integration Rules involved are ac-

*Rule 11.04: *Investigation by Grievance Committee,* (2) *The accused;* (3)*Testimony of witnesses; contempt.* Rule 11.06: *Trial by Referee and Entry of Judgment,* (7) *The respondent.*

ceptable. Petitioner was not required to subject himself to the risk of contempt of court, public scorn and imprisonment to test the validity of the Integration Rules promulgated by the court below.

Petitioner suggests that Integration Rule 11.04 (2) whereby the accused lawyer "may be required to testify .... has no right to be present or to be heard during an investigation .... no right to present other testimony or evidence, and .... no right of confrontation or cross-examination" and Integration Rule 11.06(7), ".... When the respondent attorney is subpoenaed to appear and give testimony or to produce books, papers or documents, and he refuses to appear or to produce such books, papers, or documents, or, having been duly sworn to testify, he refuses to answer any proper question, he may be cited for contempt of this Court" are per se violative of the Constitution of the United States of America. An accused lawyer should be afforded no less right than a soldier under Article 32 of the Code of Military Justice.

3. Petitioner, a lawyer from the eleventh circuit, had an inalienable right to be adjudicated by a geographically determined Board of Governors of the Integrated Bar, that was lawfully constituted and fairly apportioned in accordance with the adjudications of this Court in *Reynolds v. Sims*, 377 U.S. 533, 12 L.Ed. 2d 506, 84 S.Ct. 1362, *Swann v. Adams*, 385 U.S. 440, 17 L.Ed.2d 501, 87 S.Ct. 569 and their progeny.

The unequal and disproportionate composition of the Board of Governors violated petitioner's constitutional right to the equal protection of law. The facts in the case *sub judice* eloquently demonstrate the wisdom and the jus-

tice for the "one man—one vote" rule. Petitioner's trial occurred in the circuit where he practiced and resided—the referee and the prosecutor were both from his circuit. The referee, after observing the witnesses and listening to their testimony, was required *inter alia* by Rule 11.06(9)(a) to make a report including "recommendations as to the disciplinary measures to be applied." Upon finding attorney Curry guilty as charged the referee recommended a private reprimand (R. 139-145). Bar counsel concurred in the findings and recommendations of the referee. Obviously, the referee and Bar counsel, peers of the accused attorney, were thoroughly familiar with the mores, customs, and general practice of lawyers of the eleventh circuit. Therefore, it is not without significance that both the referee and Bar counsel separately concurring recommended that petitioner receive a private reprimand. The Board of Governors, pursuant to Rule 11.06(9)(c), acting as a quasi-judicial appellate tribunal affirmed the finding of its referee but overruled his recommendation and that of its counsel as to penalty, and recommended a six-month's suspension.

It is noteworthy that only one Governor of the thirty-four member Board had been duly elected by lawyers of the eleventh circuit thus receiving the stamp of approval of a majority of his peers—the lawyers of the eleventh circuit. The six other lawyers representing the eleventh circuit had been elected to their office by an already malproportioned Board—not by their peers of the eleventh circuit.

A fortiori, although 35% of the Florida lawyers practiced in the eleventh circuit, eleventh circuit representatives

comprised only approximately 20% of the Board of Governors.

4. Rule 11.06(9)(c)(i) of the Integration Rule of the Florida Bar (*supra* 8) specifically sets forth the prescribed procedure to be followed by the Board of Governors upon receiving a report of its referee.

The Judgment of the Board of Governors (R. 147-149; A. 17-19) abysmally fails to reflect whether the mandatory requirements of Rule 11.06(9)(c)(i) were complied with. The Judgment of the Board of Governors is no more entitled to anonymity on these issues than the judgment of any jury or any other tribunal—judicial or quasi-judicial.

The Judgment is silent in the following respects: i) Whether a five-man reviewing committee read and reviewed the entire record, ii) whether the Committee prepared a written report indicating the concurring and dissenting members as to the guilt of respondent; iii) whether the Committee indicated its recommendations for disciplinary measures; iv) whether four members of the committee concurred as to the guilt of the respondent; v) whether a quorum of the Board was present; vi) whether the Board reviewed the report; vii) how the Board voted.

To the contention that he had been denied due process, the Court stated: "The record reveals all steps were taken in this matter." With all diffidence, petitioner asserts that the record is silent in all respects urged herein. The Court also stated: "In no way has Mr. Curry been deprived of *notice* and a *hearing*, hence this point has no merit." Again with due diffidence, petitioner suggests

that the judgment of the arm of the Supreme Court of Florida, the Board of Governors of the Florida Bar, is no more entitled to anonymity on these issues than the verdict of a lay jury or the opinion of a judge or an appellate tribunal—judicial or quasi-judicial. Certainly if the meanest criminal in the land has the right to demand that jurors be asked severally if the verdict rendered is their verdict, an accused attorney is entitled to know whether the judgment of the Board of Governors is in fact the judgment of each severable member of the Board of Governors who may have participated in the entry of the judgment herein.

We suggest that if this gracious writ of certiorari is granted, this Court will immediately discern that the Record below is silent in all respects complained of. It is even possible that all seven representatives from the eleventh circuit voted to adopt *in toto* the report and recommendations of the referee. Such a fact in itself would be additional proof of the denial of equal protection by a disproportionate Board of Governors:—but, alas, corroboration of that possiblity is forever foreclosed to petitioner.

5. In promulgating disciplinary procedure for lawyers, the courts should encourage open and full disclosure rather than anonymity and star chamber procedures. The questions presented by this petition are of great and recurring significance in the administration of disciplinary enforcement. The important nature of these issues has already been recognized by this Court as recently as *Spevack v. Klein, supra.* The serious questions of public policy involved herein and the effect of the decision below if unreversed upon the historic right of due process of law, equal protection of the law and open procedures as those rights

belong to an attorney, make this case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

PAUL A. LOUIS
BERTHA CLAIRE LEE
FAY L. BECKER

By _____
PAUL A. LOUIS

APPENDIX

THE FLORIDA BAR, Complainant,

v.

Howard CURRY, Respondent.

No. 36289.

Supreme Court of Florida.

May 15, 1968.

Rehearing Denied June 28, 1968.

Disciplinary proceeding. The Supreme Court, Adams, J., held that solicitation of legal business would justify suspension.

Attorney suspended.

Ervin, J., dissented.

1. Attorney and Client—58

Solicitation of legal business would justify suspension. 32 F.S.A., Code of Ethics, rule B, § 1, subd. 27.

2. Attorney and Client—51

Conclusion was required that bar association board of governors was duly and legally constituted at time it recommended suspension of attorney.

3. Attorney and Client—48, 54, 57

Conclusion was required, in attorney disciplinary proceeding, that necessary procedural steps for review were taken and that attorney was not deprived of notice and a hearing. 32 F.S.A. Integration Rules of Florida Bar, art. 11, rule 11.06(9) (c) (1).

4. Attorney and Client—46

No statutory immunity existed as to attorney who testified before grievance committee and before referee as to alleged improper conduct. U.S.C.A.Const. Amends. 5, 14; F.S.A.Const. Declaration of Rights, § 12; 32 F.S.A. Integration Rules of Florida Bar, art. 11, rule 11.04(2, 3).

Lyle D. Holcomb, Jr. and Earl D. Waldin, Jr., Miami, for complainant.

Sinclair, Barfield & Louis, Paul A. Louis, Fay L. Becker and Bertha Claire Lee, Miami, for respondent.

ADAMS, Justice.

We have for review a recommendation of The Florida Bar asking a six months suspension be entered against one Howard Curry, an attorney.

This proceeding arose by the Grievance Committee finding probably cause that Howard Curry

had violated Canon of Ethics #27, 32 F.S.A. in that he wrongfully solicited legal business. Hearings were held which revealed that Curry was an attorney and an accountant. In the latter capacity he had over a period of years made numerous income tax returns for clients. The crux of this matter occurred when Curry mailed to some 800 of these people for whom he had made income tax returns the following letter:

"Dear Client:

"There are several things I would like to talk to you about and I do not have the time to cover all the subjects while you are on your annual brief visit to the office. Certain problems have arisen over the years in which I have carefully explained to the particular client the solution to these problems but it it not possible for me to talk to all of you even though you may have the same problems, because of the time element, so I take this means as a substitute for a personal visit.

"TAXES

"As you must have read, Internal Revenue is quickly bringing automation into its procedures. This means that you are now a Number in a Computing Machine—That your return is checked as to the average deductions and possibly thrown out by the machine when they exceed the average. You might very well have incurred debts to an extent where your interest deduction was prorationally high for your income, or you might

have had sickness in the family which might have increased your medical deductions above the average, or you might be subject to a sample audit in which your return is plucked from a large mass of returns and is automatically audited. Internal Revenue will spend the next few years trying to adjust the machines to reflect particular problems that they wish to investigate. For instance this year the emphasis is on dependants. Last year the machine was set so that it would kick out any return of a single person who listed a dependant. The previous year the emphasis was on travel expenses. We don't know what next year will bring, but as the years go on the possibility of an audit of your return increases. Although the percentage of returns I prepare which are audited are less than 3% of my gross business, those 3% taxpayers are unhappy and feel discriminated against or even that my services were to blame. No one knows exactly why a return is audited but the signature of a well known professional diminishes the probability of an audit.

"For many years I pursued the policy of helping the taxpayer assemble their records and in some cases making no charge for representing them. This has now become impossible. I do not want my clients to appear before Internal Revenue alone because whatever the agent might say, or determine, they have no knowledge whether he is right or wrong (and he is often wrong), so I have offered to represent the taxpayers who are audited for a token fee and make every effort

to keep the taxpayer away from the agent, for I am well known and respected in the local office and can usually do a better job of representing the taxpayer than the taxpayer could himself do. This means the Agent's level only. If it is necessary to appeal his decision and go to a higher level then of course this means additional expense but which you and I will agree on beforehand. Therefore I have adopted the following policy. If your return is audited you are to contact me immediately, I will then help you assemble whatever records are called for. There is no charge for this service. If you wish me to represent you at the hearing I will handle the entire audit. For this service there is a small fee. Remember, the fee you pay me each year is for the preparation of the return *only* and does not include a defense and representation of the return. I hope that this clears the air and that you will now understand my policy as to the tax return audits.

"LAW

"It is not unusual for a client to come into my office and state that they have bought or sold property, adopted a child or obtained a divorce or had an estate plan drawn up or made a Will, all handled by another attorney, and in a lot of cases not handled to the client's satisfaction. All of this work I have been doing for 15 years and the client expresses surprise upon finding out that this is a *Law Office*. Being and (sic) Accountant *and* an Attorney at Law the services of these two professions are contained in one office and are a

necessary ingredient in the settlement or preparation of almost any legal problem you may have. In the field of Estate planning, taxes is a paramount issue, so the lawyer who prepares it must have a thorough knowledge of taxes, accounting and law. This holds true in divorces. It is every man's or woman's desire to come out of a property settlement or a divorce with untaxed income or a minimum of taxes. This again requires the service of the two professions.

"Many of my clients have sideline businesses which they must co-ordinate with their other income. In buying and selling property there always arises the question of the proper method of a sale or purchase to minimize the tax impact. Regardless of what you do, or intend to do, there is both the legal and tax problem involved and coordination of both is imperative. It is a sad thing to hear a client who's been walking into these *Law Offices* for 15 years to say that they did not know that I handled matters other than tax problems. We always have and always will be available for all Legal, Tax and Accounting problems to our clients, a lot of times at no fee, simply because you are a client and have preference over those who are not clients.

"Briefly then, we want you to know once and for all that this is a *Law Office* and handles matters involving *legal problems.* Of course we are tax specialists but a major part of our business throughout the year is devoted to the general practice of law such as estate planning, real es-

tate, divorces, property settlements, business organizations, wills, etc.

"I hope I have clearly stated our position here and that you understand that we are ready to handle any of your Tax, Law and Accounting work. That you are a preferred client and my office and telephone is at your disposal throughout the year.

"I do hope I see you again this season and that you can see your way clear to making it early so that we may have more time to go over your problem, whatever it may be and chat with you at length about it.

"Best Wishes,
/s/ Howard Curry"

(Emphasis his)

After hearing before the Referee, the latter was found guilty and recommended a private reprimand.

On review as provided by rule, the Board of Governors of The Florida Bar approved the Referee's finding of guilt but found that Curry should be not only reprimanded but should be suspended for six months and pay the costs.

The matter is now before us for review and Mr. Curry has assigned five points which we will treat.

[1] The first point is: "Does the record reflect that respondent solicited professional services 'not warranted by personal relations'?" Inasmuch as the recipients of the letter were people who had theretofore availed themselves of Mr. Curry's services on tax matters, it may be said that the invitation was warranted on personal relations and therefore not in derogation of the rule. We have therefore considered the matter in the light of Mr. Curry's testimony wherein he testfied he had spent a great deal of time in preparing the letter. We are led to the conclusion that the content of the letter in the argumentative form carried a message that can leave no doubt that it solicited any and all kinds of legal work. When measured by the judgment of disinterested members of the Bar we conclude there can be little doubt that Mr. Curry was sending a message that his brethren of the Bar had been giving some poor and costly services and he could do a better job. His oral testimony likewise added to the construction accepted by the Bar.

The second point is: "Is a judgment of suspension for six months entered by the Board of Governors, unconscionably harsh and contrary to the law and to the evidence, where the referee and the bar counsel recommended a private reprimand, and the referee found: (i) letter went to those with whom he had previously had contact as a lawyer; and (ii) there was no evidence that respondent had reason to believe he had been supplanted by another attorney; and (iii) there was no intent to take business away from another at-

torney or to profit by the consultations?" Meting out punishment to an offender is one of the most delicate and difficult duties in all our jurisprudence. Hardly any two will agree on the same punishment. What is punishment to one offender is of no consequence to another. In this instance the Referee was of the opinion that a finding of guilty and a reprimand was adequate. The Board of Governors thought somewhat differently and added the six months suspension. We are not constrained to overturn the finding of the Board of Governors.

[2] The third point is: "Where pursuant to reapportionment of Board of Governors of Florida Bar (in the matter of The Florida Bar, Fla., 175 So.2d 530) the Board of Governors appointed additional members to fill said newly created offices, instead of election by the active members of The Florida Bar, was the enlarged Board of Governors unconstitutional and unlawfully constituted and any action taken thereby void?" We have considered this matter and conclude that the Board was duly and legally constituted and Mr. Curry's contention is without merit on that phase.

[3] The fourth point is: "Is the judgment of suspension entered in this action invalid where said judgment does not reflect whether the procedural steps for review set forth in Rule 11.06 (9) (c) (1) of the Integration Rule of The Florida Bar had been followed?" The record reveals that all steps were taken in this matter. In no way has Mr. Curry been deprived of notice and a hearing, hence this point has no merit.

[4] The fifth point is: "Where pursuant to Rule 11.04(2) (3) of the Integration Rules, respondent was required to produce records and testify against himself before the Grievance Committee and before the Referee (over his objection) respondent was granted immunity under the Fifth and Fourteenth Amendments to the United States Constitution and Section 12, Declaration of Rights, Florida Constitution against any further disciplinary procedures." In this proceeding we have no statutory immunity where he is called to testify. Mr. Curry relies upon immunity under the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 12 of the Declaration of Rights of the Florida Constitution. At no time during this proceeding did Mr. Curry refuse to testify or otherwise claim his constitutional rights against self-incrimination.

Accordingly, it is the order and judgment of this Court that the respondent Howard Curry, a member of The Florida Bar, be and he is hereby suspended from the practice of law in this State for a period of six months from the effective date of this order. Costs of these proceedings in the amount of $157.00 are hereby taxed against the respondent and the same are hereby ordered to be paid within thirty days from the effective date of this order. In the event said costs are not paid within said time, execution shall issue therefor.

It is so ordered.

CALDWELL, C. J., and THOMAS, ROBERTS, ERTS, DREW and THORNAL, JJ., concur.

ERVIN, J., dissents with Opinion.

ERVIN, Justice (dissenting).

I would approve Referee's recommendation.

The Florida Bar Journal, January 1966, Vol. 40, No. 1.

CERTIFICATION OF BOARD POSITIONS

Pursuant to Section 1(c) of Article III of the Integration Rule of The Florida Bar, as amended by the Supreme Court of Florida May 19, 1965, I hereby certify, as Executive Director of The Florida Bar, that based upon the official records in my office the number of active members of The Florida Bar residing in each of Florida's seventeen judicial circuits is as follows:

Judicial Circuit	Active Members
First	180
Second	268
Third	53
Fourth	705
Fifth	123
Sixth	579
Seventh	231
Eighth	123
Ninth	738
Tenth	222
Eleventh	2,828
Twelfth	351
Thirteenth	580
Fourteenth	69
Fifteenth	407
Sixteenth	26
Seventeenth	592
Total in State of Florida	8,075

Using the apportionment formula set forth in Section 1(b) of Article III of the Integration Rule of The Florida Bar, and applying it to the figures mentioned above, the number of circuit representatives eligible for service on the Board of Governors of The Florida Bar is as follows:

Judicial Circuit	Number of Circuit Representatives
First	1
Second	2
Third	1
Fourth	3
Fifth	1
Sixth	2
Seventh	2
Eighth	1
Ninth	3
Tenth	1
Eleventh	7
Twelfth	2
Thirteenth	2
Fourteenth	1
Fifteenth	2
Sixteenth	1
Seventeenth	2

Dated this the 15th day of December, A.D. 1965.

Marshall R. Cassedy
Executive Director

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 569

HOWARD CURRY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

EARL D. WALDIN, JR.
1301 duPont Building
Miami, Florida 33131

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IN THE

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HOWARD CURRY,

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vs.

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Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTIONS

1. WHETHER A LAWYER, WHO IN A DISCIPLINARY PROCEEDING APPEARS AND TESTIFIES BEFORE A GRIEVANCE COMMITTEE OF THE FLORIDA BAR, AND BEFORE A REFEREE OF THE FLORIDA BAR, WITHOUT RAISING ANY PERSONAL PLEA AGAINST SELF INCRIMINATION, CAN LATER ASSERT THE JUDGMENT AND PENALTY IMPOSED BY THE SUPREME COURT OF FLORIDA IS INVALID,

THE LAWYER NOW CLAIMING THAT THE INTEGRATION RULE REQUIRED HIM TO TESTIFY BEFORE THE GRIEVANCE COMMITTEE UNDER THE THREAT OF BEING CITED FOR CONTEMPT.

2. DOES THE BOARD OF GOVERNORS OF THE FLORIDA BAR HAVE TO BE CONSTITUTED IN SUCH A FASHION THAT THE NUMBER OF GOVERNORS FROM EACH JUDICIAL CIRCUIT MUST CORRESPOND TO THE NUMBER OF LAWYERS IN EACH JUDICIAL CIRCUIT ON THE "ONE MAN — ONE VOTE" RULE?

3. WHERE PETITIONER CLAIMS THE DENIAL OF DUE PROCESS OF LAW, IS THE BURDEN UPON PETITIONER TO SHOW FROM THE RECORD IN WHAT MANNER DUE PROCESS WAS DENIED PETITIONER?

STATEMENT

Petitioner's statement attempts to make factual the very conduct which is controverted. Petitioner was not required to testify and give evidence against himself (PP 10, 11)*; nor was the petitioner Curry called over his vehement protests as a witness against himself (PP 13).

When petitioner appeared before the Grievance Committee of The Florida Bar, he was not required to testify against himself. When the hearing began, the following occurred:

"MR. WAITZKIN: You are Howard Curry?

"MR. CURRY: Yes, sir.

*References are to pages in petitioner's petition.

"MR. WAITZKIN: And you are an attorney?

"MR. CURRY: Yes, sir.

"MR. WAITZKIN: Your name is Marta Larrazabal?

"MISS LARRAZABAL: Yes.

"MR. WAITZKIN: **Mr. Curry, you needn't be sworn if you don't want to. You may make your statement under oath or not.**

"MR. CURRY: **I have nothing to hide. If that is your procedure, it is all right with me.**

"(At this point Mr. Curry and Miss Larrazabal were both sworn to tell the truth and to secrecy.)"

(Transcript of proceeding before Grievance Committee admitted by stipulation as Complainant's The Florida Bar, Exhibit 1, See R 41, 42)

Thereafter petitioner was called as a witness and testified without invoking the Fifth Amendment. The only objection raised by petitioner during this hearing related to the letters he had mailed out to 800 persons for whom he had prepared tax returns:

"Well, I would like to know what right this Committee has to invade privileged communications. I spent three months on that letter and I know every word of it. It is perfect and there isn't a thing wrong with it. (idem)

* * *

"I challenge the jurisdiction of The Florida Bar to invade a privileged communication. This opens the door wide. This means that you can come in and look at everything I ever wrote. I wrote this to a client and for very good reason which I will be glad to tell you why I did that.

"MR. WHITE: Mr. Curry, wouldn't you say that if this is a privileged communication that the privilege has obviously been waived by the client turning it over to the Bar?

"THE WITNESS: I want to know how the Bar got it. Did a client turn it over to the Bar?

"MR. ALBOUM: How else could we get it?

"THE WITNESS: I don't know." (idem)

When petitioner appeared before the Referee, he did not raise any personal plea against self incrimination. The Motion to Dismiss, filed by his attorney, claimed respondent had obtained immunity from any type of penalty or forfeiture by being required to testify before the Grievance Committee (R 41, PP 11-14).

REASON FOR NOT GRANTING THE WRIT

The decision below is not in direct conflict with the decision of this Court in **Spevack v. Klein,** 385 U.S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625; and **Garrity v. State of New Jersey,** 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 625 (PP 21). Spevack involved a proceeding to discipline a member of the New York Bar for professional misconduct. Of the

various charges made, only one survived, viz., the refusal of Spevack to honor a subpoena duces tecum served upon him in that he refused to produce the demanded financial records and refused to testify at the judicial inquiry, for which refusal Spevack was disbarred. Spevack's sole defense was that the production of records and his testimony would tend to incriminate him. In reversing Spevack's conviction of disbarment, the Supreme Court said:

> "***[W]e conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it***." (P. 627)
>
> * * *
>
> "We said in Malloy v. Hogan:
>
> > 'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence.' 378 U.S. at 8, 34 S. Ct. at 1493." (P. 628)

When petitioner Curry was served with a subpoena to appear and testify before the Grievance Committee of The Florida Bar, petitioner had the choice of complying or refus-

ing to comply therewith. If he failed to honor the subpoena, he might have been cited for contempt. If he had been cited for contempt, then, at any contempt hearing, he might have raised the plea against self incrimination. Petitioner elected to comply with the subpoena and appear before the Grievance Committee.

In contrast to Spevack, petitioner

1) Was not disciplined for refusing to appear or testify before the Grievance Committee;

2) Was not required to testify against himself;

3) Did not timely refuse to testify on the ground that his answers would tend to incriminate him.

Petitioner's attorneys assert that petitioner carefully preserved his constitutional rights in his Motion to Dismiss and the Stipulation between petitioner and The Florida Bar in the proceeding before the Referee. In the Motion to Dismiss, petitioner's attorneys, as grounds for said motion, said:

> "2). That assuming arguendo that (i) the Florida Bar had jurisdiction over the respondent and (ii) that the respondent was guilty of some professional impropriety, a fact which is vehemently denied, by requiring the respondent to testify before the Grievance Committees of the Eleventh Judicial Circuit, the respondent has obtained immunity from any type of penalty or forfeiture, including the revocation of his license to practice law. See § 932.29, F.S.A. and **State Bever-**

age Department of Florida v. State of Florida ex rel. Zucker, (Fla. App. 3rd 1960) 116 So. 2d 640." (PP 11)

Zucker is inapplicable. Zucker obtained immunity under F.S. §932.29 by reason of which it was unnecessary for Zucker to invoke the plea against self incrimination. The Supreme Court of Florida found that petitioner obtained no statutory immunity and that petitioner relies upon immunity under the Fifth and Fourteenth Amendments of the Constitution of the United States and § 12 of the Declaration of Rights of the Florida Constitution. Any "constitutional immunity" petitioner might have obtained would have come only if he had been compelled to testify against himself after invoking the plea of self incrimination. This did not occur. Neither at the Grievance Committee hearing nor at the hearing before the Referee did petitioner refuse to testify on the ground that his answers would tend to incriminate him. The motion to dismiss the complaint filed by petitioner's attorney before the Referee is not even such a plea because the privilege cannot be claimed for the witness by his counsel. **Ziegler v. United States** (9th Cir. 1949), 172 F. 2d 439, cert. den., 338 U.S. 822, 94 L. Ed. 499, 70 S. Ct. 68; **Schoeps v. Carmichael** (9th Cir. 1949), 177 F. 2d 391, cert. den. 339 U.S. 914, 94 L. Ed. 1340, 70 S. Ct. 566. The applicable principle is succinctly stated in **United States v. Murdock,** 284 U.S. 141, 76 L. Ed. 218, 52 S. Ct. 63, to be:

> "The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. United States ex rel. Vajtauer v. Com'r. of Immigration, 273 U.S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560." (p. 64)

Petitioner appeared and testified before the Grievance Committee and the Referee without asserting his constitutional right to remain silent.

In the Supreme Court of Florida petitioner's attack on the Board of Governors of The Florida Bar was:

> "Where pursuant to reapportionment of Board of Governors of Florida Bar (in the matter of The Florida Bar, Fla., 175 So. 2d 530) the Board of Governors **appointed** additional members to fill said newly created offices, **instead of election** by the active members of The Florida Bar, was the enlarged Board of Governors unconstitutional and unlawfully constituted and any action taken thereby void?" (PP 18, 19)

Petitioner, by point II of this petition, now says that "he has been deprived of equal protection of the law because of the malapportionment of the governing body of the Florida Bar . . ." (PP 16); that

> Petitioner, a lawyer from the eleventh circuit, had an inalienable right to be adjudicated by a geographically determined Board of Governors of the Integrated Bar, that was lawfully constituted and fairly apportioned in accordance with the adjudications of this Court in Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362, Swann v. Adams, 385 U. S. 440, 17 L. Ed. 2d 501, 87 S. Ct. 569 and their progeny." (PP 23)

The "equal protection" clause of the Constitution simply means that no person or class of persons shall be denied the protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. Petitioner does not contend that he was discriminated against as compared to other lawyers in the Eleventh Judicial Circuit of Florida, but that the lawyers of the eleventh circuit were discriminated against as compared to other circuits, because the Board was not geographically proportioned on the "one man—one vote" basis. Petitioner then implies that if there had been more Miami lawyers on the Board, the Board might not have recommended a six months' suspension (PP 24).

Respondent submits that the "one man—one vote" rule is inapplicable; however, when the question of the Board's apportionment was raised at the time of the petition to enlarge same was considered, Justice O'Connell, concurring specially, said:

> "The Florida Bar operates between its annual meetings through a Board of Governors elected directly by the lawyers of Florida under an apportionment formula that might well satisfy the federal courts." **In Re The Florida Bar,** (Fla. 1966), 134 So. 2d 649.

Assuming arguendo, but not conceding, that the Board is malapportioned, the petitioner was not denied "equal protection" in that the Integration Rule of The Florida Bar provides:

> "(iii) Filing. If the respondent is found guilty and the judgment includes public reprimand, sus-

pension from practice or disbarment, the Executive Director shall file the entire record with the Clerk of the Supreme Court." (11.06(9)(c), (PP 9) The Integration Rule further provides:

"Rule 11.11: Appellate Review

All judgments entered in proceedings under these Rules of Discipline shall be subject to appeal by petition to the Supreme Court in the following manner:

"(1) * * *

"(2) * * *

"(3) Procedure. Appeals shall be only in accordance with the following procedure.

"(a) Petition for review. The appeal shall be commenced by filing a petition for review with the Supreme Court and two copies thereof with the Executive Director within 30 days after entry of judgment or order to be reviewed. * * * The filing of the petition and copies is jurisdictional, and failure to file the petition and such copies within such 30-day period shall preclude an appeal.

"(b) Record on appeal. If the appeal is from a judgment of the Board of Governors, the Executive Director shall forward the entire record to the Supreme Court within ten days after the filing

with the Executive Director of a copy of the petition for review."

"(c) * * *

"(d) * * *

"(e) * * *

"(f) Judgment of Supreme Court. After review the Supreme Court shall enter an appropriate order or judgment. If no appeal is taken from a judgment or order entered under these rules, and if a certified copy thereof has been filed with the Court, the Court shall enter a judgment thereon.

"(4) * * *

"(5) * * *

"(6) * * *"

The legal status of the "judgment" entered by the Board of Governors of The Florida Bar, pursuant to Integration Rule, has been described by the Supreme Court of Florida in the following language:

"[1] The report of The Board of Governors of The Florida Bar styled "Judgment" is in effect a report akin to a Master's Report in a chancery matter and **the final orders or judgments in cases of this kind under the Florida Constitution must be entered by this court.**

> "[2] We, therefore, have examined the record, the briefs and respondent's Petition for Review and the "Judgment", and think that the Board of Governors properly considered respondent's prior transgressions in making final disposition in this case." **The Florida Bar v. Swidler,** Fla. 1967, 199 So. 2d 713, 714.

See also **The Florida Bar v. Abramson,** (Fla. 1967), 199 So 2d 457, 460; **Application of Harper,** (Fla. 1956), 84 So. 2d 700, 706.

The judicial act, whether a petition for appellate review is filed or not, which imposes discipline on an attorney is the judgment of The Supreme Court, not the "judgment" of the Board of Governors. The punishment imposed by the Supreme Court of Florida may be the punishment recommended by the Board of Governors, e. g. **The Florida Bar v. Taylor** (Fla. 1964), 167 So. 2d 729; or a harsher punishment THAN THAT recommended by the Board of Governors, e. g. **The Florida Bar v. Benton** (Fla. 1963), 157 So. 2d 420; or a lesser punishment than that recommended by the Board of Governors, e. g. **The Florida Bar v. Bright** (Fla. 1964), 165 So. 2d 747; **The Florida Bar v. Swanson** (Fla. 1965), 172 So. 2d 827.

The judgment from which this petition for writ of certiorari is taken is the judgment of the Supreme Court of Florida, 211 So. 2d 169 (A 1-11), not the "recommended judgment" of the Board of Governors of The Florida Bar. The judges of the Supreme Court of Florida are elected state-wide, so the judicial act taken herein does not violate the "one man—one vote" concept.

Petitioner contends that for the "judgment" recommended by the governing body of The Florida Bar to be valid, it must affirmatively reflect that the requirements of Rule 11.06(9)(c)(i) were complied with (PP 25). **Petitioner does not contend that the procedure provided for by said rule was not followed.**

The Florida Bar was integrated on June 7, 1949 by order of the Supreme Court of Florida. On December 6, 1955, the Supreme Court of Florida adopted a completely amended integration rule. The Florida Bar is governed by and operates under such amended integration rule. When the Supreme Court of Florida considered the petition of the Florida State Bar Association praying for a rule integrating The Florida Bar, the Supreme Court of Florida said that it had the inherent power to integrate the Bar of Florida by rule of court. **Petition of Florida State Bar Association,** 40 So. 2d 902.

Rule 11.03 of the Integration Rule provides:

> "The jurisdiction of the Supreme Court shall be administered in the manner hereinafter stated. The following entities are hereby designated as agencies of the Supreme Court for this purpose and with the following responsibilities, jurisdiction and powers:
>
> "(1) The Board of Governors of The Florida Bar. The Board of Governors of The Florida Bar is assigned the responsibility of maintaining high ethical standards among al its members. The Board of Governors of The Florida Bar shall supervise

and conduct disciplinary proceedings in accordance with the provisions of these rules."

Since the Grievance Committees and the Board of Governors of The Florida Bar are agencies of the Supreme Court, the members thereof may be considered to be public officers performing an administrative function for the Supreme Court of Florida.

> "Whether created by or pursuant to statutes or by court rules, integrated bars have common characteristics of being organized by or under the direction of the state, and of being under its direct control; and in effect such bars are governmental bodies." 7 am. Jur. 2d, Attorneys at Law, § 7, page 47. See also the annotations in 114 A.L.R. 161, 151 A.L.R. 617.

> "The general rule that in the absence of evidence to the contrary, public officers will be rebuttably presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner, is usually applied when regulations, decisions, or orders of an administrative officer or agency, acting within the limits of the jurisdiction conferred by law, are challenged in court. Where there is no right to a trial de novo, the burden of proving otherwise is upon the party complaining unless a statute provides to the contrary." 2 Am. Jur., Administrative Law, § 748, pages 647, 648.

In its judgment, the one from which petitioner seeks this writ of certiorari, the Supreme Court of Florida found:

"The record reveals that all [procedural] steps were taken in this matter. In no way has Mr. Curry been deprived of notice and a hearing. His point has no merit." (App. 9)

Petitioner has not shown any denial of due process in regard to the judgment entered by the Supreme Court of Florida.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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